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Supreme Court, U.S.
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No. 94-970

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

JACK B. BUSTER,

Petitioner,

v.

THOMAS, HEAD & GREISEN EMPLOYEES TRUST, RONALD E. GREISEN; HENRY P. HEAD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION

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I. INTRODUCTION

Respondents' Brief in Opposition to the Petition for Certiorari raises issues for the first time in this proceeding which evoke a reply. One of the new issues is substantial; of the other two, one involves a disingenuous misstatement of the magnitude of this controversy and the other gratituously denigrates the petitioner. The first will be discussed in appropriate depth and the other two in appropriate brevity.

II. ARGUMENT STATING REASONS FOR GRANTING THE WRIT

There Is a Real and Embarrassing Conflict of Opinion and Authority Between the Circuit Courts of Appeals.

This court has recognized that ERISA is a "comprehensive and reticulated statute," the product of a decade of Congressional study of the nation's private employee benefit systems. Mertens v. Hewitt Associates, __ U.S. __, 113 S.Ct. 2063, 2066 (1993). This court recognized ERISA's enforcement scheme as "carefully crafted

and detailed," providing strong evidence that remedies not provided by Congress were not omitted simply because Congress forgot to incorporate them expressly. Mertens, 113 S.Ct. at 2067. It thus is apparent that all enforcement provisions of the statute were "carefully crafted" to embody the intent of Congress.

Consequently, the respondents' contention that Buster's citation to 29 U.S.C. 1002(14)(A), 1106(a)(1), 1109(a) and 1131 is erroneous is totally lacking in merit. It is incumbent on the federal courts to construe the statute as a harmonious whole. When that is done, it is impossible to escape the obvious result, i.e., that if Buster was a fiduciary to the Plan, any sale by him of an investment to the Plan was a prohibited transaction, which also involved commission of a misdemeanor by the Plan Trustees with respect to each such transaction. When the court recognizes and enforces any such transactions, it not only condones, but becomes a participant in, violations of disciplinary provisions carefully

crafted by Congress to protect the integrity of the private employee benefit system. This appears to be the only case in which a circuit court of appeals has granted relief to trustees of a plan based on their indulgence in prohibited transactions, thus rewarding them for violating the enforcement provisions which are "the product of a decade of Congressional study."

As this court has stated, ERISA is a reticulated statute, an interwoven network of harmonious provisions which form a web reflecting the overall intent of Congress. If all of the provisions of the Act are considered together, in order to conclude that Buster and the Plan Trustees had a meeting of the minds necessary for Buster to be a fiduciary as an investment advisor, the court would have to conclude that at least the Trustees, and possibly Buster, intended to engage in prohibited transactions as well as misdemeanors. If the District Court reached such a conclusion, it became a participant in breaking the law when it enforced the illegal

transactions. On the other hand, if the District Court disregarded the important enforcement provisions of the reticulated statute, it erred in construing the statute. Either way, its legal conclusions should not be upheld. Either way, the Court of Appeals erred.

This case cannot be construed as a factual dispute. There was no factual dispute involved in the appeal and there is no factual dispute involved in the present petition. Both the appeal and this petition take for granted the District Court's findings of historical fact.[1]

Other courts of appeals have avoided the dilemma inherent in the decision of the Ninth Circuit Court of Appeals in this case. That dilemma is that it is inherent in the majority opinion of the Ninth Circuit that only certain

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[1]At the trial there was almost no dispute about the circumstances of the transactions. The dispute was about the conclusions from those transactions. The fact dispute at trial was whether or not there were any misrepresentations, but the District Court's findings as to that issue are not an issue in this petition.

provisions of the ERISA statute were considered with total disregard of other provisions, resulting in a decision which is abhorrent to the reticulated statute; or, the Court of Appeals has condoned and joined in violations of the statute. The other courts of appeals have recognized the conflict of interest, as well as the explicit prohibition by Congress, in a person who is selling his own products being a fiduciary. A fiduciary must have undivided loyalty and act in the best interest of the beneficiary, which is contrary to human nature for a person selling his own products, who, if he wants to stay in business, must look out for his own best interest. Buster recognized this in his trial testimony: "I simply can't serve two masters. I can't serve my own needs and someone else's at the same time" (RT 2-111).

All others courts of appeals that have considered analogous fact situations[2] have recognized that an individual or company selling its own property, or a broker being compensated only from commissions on sales, cannot be an ERISA fiduciary. American Federation of Unions v. Equitable Life Assurance Society, 841 F.2d 658, 664 (5th Cir. 1988)("Simply urging the purchase of its products does make an insurance company an ERISA fiduciary with respect to those products." and, "Equitable had no control whether the Fund would accept or reject its advice to self-insure.");[3] Consolidated Beef Industries v. New York Life Insurance Co., 949 F.2d 960, 965 (8th Cir. 1991)("Billings was merely a salesperson earning commission and not a fiduciary under ERISA"; "NYL had no such control over CBI's ERISA

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[2]As Judge Ferguson pointed out in his dissenting opinion, the facts are more compelling in this case. Appendix to Petition at A32.

[3]There is no evidence that Buster gave any advice other than descriptive information about the deed of trust packages he offered for sale.

funds. NYL simply sold CBI annuities; it did not recommend specific investments beyond its own products."); Brown v. Roth, 729 F.Supp. 391, 396 (D.N.J. 1990)("To presume Brown's transfer of funds resulted solely from Roth's influence is to presume that Brown is without general business acumen.");[4] Farm King Supply, Inc. v. Edward D. Jones & Co., 884 F.2d 288, 294 n. 8 (7th Cir. 1989)("Moreover, because of the compensation scheme, the trustees had to be aware that if Jones were truly a fiduciary by providing advice which the trustees were relying on as a primary basis for the Plan's investments, then every investment made through Jones would violate the party in interest prohibited transaction rule of ERISA, 29 U.S.C. § 1106.") In Olson v. E.F. Hutton & Co. Inc., 957 F.2d 622, 626 (8th Cir. 1992), the court recognized that the regulations, 29 C.F.R. 2510.3-21(c)(1) (1992) (ii)(B), were adopted to ensure that brokers are not given fi-

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[4]It is undisputed that the respondents were very sophisticated investors.

duciary status without their knowledge. It seems obvious that a seller or broker cannot be a party to a "meeting of the minds" as contemplated by the regulation without his knowledge.[5]

Thus, the conflict between the Ninth Circuit Court of Appeals and the other circuits is not only obvious and embarrassing, it creates a situation in which no brokerage company, no seller of securities, and no insurance company can dare to enter into any transactions with any ERISA Plan within the jurisdiction of the Ninth Circuit Court of Appeals, while the decision in this case stands, unless they have the confidence that because of their wealth and financial power they will receive more favorable treatment from the courts than Buster has received. It is folly to assert, as the respondents do, that the decision of the Court of Appeals in this case

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[5]The majority of the Ninth Circuit panel recognized that Buster did not know or believe he was a fiduciary. Appendix to Petition at A10.

affects no one except the parties involved.[6] The decision of the Court of Appeals in this case affects not only these parties, but also the millions of participants in ERISA plans within the jurisdiction of the Ninth Circuit as well as all individuals, corporate entities and others who may consider doing business with ERISA plans.

Of course, the amount of the Judgment in this case is not Buster's sole stake. Buster has suffered many other damages as a result of the decision in this case, as related in the District Court Order set forth in the Appendix to the respondents' Brief, which they have included for no apparent purpose other than the gratuitous

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[6]The respondents attempt to portray the decision in this case as too insignificant for this court's attention not only by incorrectly asserting that it affects no one but these parties, but also by disingenuously stating (see footnote 2 at page 5 of Respondents' Brief in Opposition) that the amount involved is less than $150,000, when in reality, the Judgment is more than double that amount. See the summary included as an Appendix hereto, which Buster's counsel certifies to be correct.

denigration of Buster's motives and character.[7]

III. CONCLUSION

This case is important not only to the parties involved, but to millions of ERISA Plan participants as well as all who do or contemplate business with ERISA Plans.

The decision of the Court of Appeals in this case is erroneous for the reasons set forth here and in the main petition. This court is urged to grant the Petition for Certiorari and consider the case on its merits.

Dated the 10 day of January, 1995.

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[7]Only by an enormous exercise of self discipline has Buster's counsel refrained from including here as an Appendix Buster's Motion to Reconsider the District Court Order set forth in the Appendix to the respondents' brief, detailing the inaccuracies and inappropriateness of the District Court's pre-judgment of a case over which it has erroneously retained jurisdiction.

SUMMARY OF AWARDS

The Final Judgment of the District Court in the Appendix of the Petition for Certiorari (A63-A64) leaves blank spaces for the amounts of attorneys fees, costs and total judgment to be awarded. The following additions have been made:

04/05/93 -	Amended Final Judgment	$190,057.64
05/28/93 -	Award of Post-Judgment Attorney's Fees	25,000.00
09/22/94 -	Attorneys' Fees Awarded by Court of Appeals	23,929.90
09/22/94 -	Award of Costs by Court of Appeals	343.92
11/16/94 -	Award of Post-Judgment Costs by District Court	12,292.95
12/22/94 -	Award of Post-Judgment Attorneys' Fees by District Court	58,604.00
	Total:	$310,228.41